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IN THE

Supreme Court of the United States

October Term, 1966

No. ~~966~~ 28

PROVIDENT TRADESMENS BANK AND TRUST COMPANY, ADMR. of the Estate of JOHN R. LYNCH, A/K/A JOHN ROBERT LYNCH, Deceased,

Petitioner,

and

JOHN LANDIS HARRIS

and

SARAH B. SMITH, Admx. of the Estate of THOMAS W. SMITH, Deceased

v.

LUMBERMENS MUTUAL CASUALTY COMPANY

and

GEORGE W. PATTERSON, ADMR. of the Estate of DONALD CIONCI, Deceased.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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STATEMENT OF THE CASE.

With respect to the petition now before this Honorable Court, the respondent accepts the Statement of the Case as set forth in the petition.

REASONS FOR DENYING THE WRIT.

I. The named insured in the automobile liability policy issued by the respondent was an indispensable party but was not joined in the declaratory judgment action.

This proposition is supported by the decided cases and the reasoning of the Court of Appeals for the Third Circuit in its opinion.

The purpose of this response to the petition for the writ is to consider the points stressed in the minority opinion.

II. The minority view would not do justice to all parties.

It must be considered from the outset that the plaintiff, Provident Tradesmens Bank & Trust Co., Admr. of the Estate of John R. Lynch, Dec'd, chose the forum and that the other plaintiffs, although free to do so, never pursued their actions in the Common Pleas Court of Delaware County, Pennsylvania. The tort claims came into being in Delaware County, all of the dead and injured persons resided in that county and every necessary party was subject to the jurisdiction of the Common Pleas Court of Delaware County. The "complete justice" which concerns the minority could have been achieved in the courts of the Common-

wealth of Pennsylvania. The problem which has consumed so much time of the Court of Appeals would not have existed had the plaintiffs pursued their rights in the state courts. Since the minority seems concerned about the years which have elapsed since the litigation began, it is appropriate to note that all litigation could have been completed between five and six years ago had the actions been brought in Delaware County.

If the plaintiffs felt that it was good tactics to attempt a piecemeal handling of the various aspects of the litigation, the consequent delay is of their making and should not now be placed in the scales to counter-balance the justice due *all parties. Those comments, concerning the length of time* which has passed since the accident, and court congestion (Appendix A, page 34, n. 12), would not seem to add weight to an argument, the purpose of which is to support a judgment determining the rights of parties to property.

In practice, the complicated procedures advocated by the minority would protract litigation in the instant case and would set a precedent which would lead to chaotic conditions for as long as it continued to be the law. This conclusion is supported by the reading of the minority opinion as it relates to suppositions as to what may happen in the tort actions, what further litigation may be required in the state courts, and the admitted possibility that the conclusion reached in the state court may be at variance with the judgment of the federal district court which it would affirm.

So far as the future is concerned, one may easily foresee the multiplicity of litigation if federal courts decide cases on an issue, which decisions do not bind others intimately concerned but not bound by the judgments; and where such persons, as Dutcher in the instant case, are free to seek and obtain judgments completely at variance with the judgments of the federal court.

Some aspects of the foregoing are considered hereinafter

with reference to cases decided by this Honorable Court, cases which are decisive of the principal issue in this case but not mentioned in the minority opinion.

It would not be fair to say that the plaintiffs elected to try this litigation piecemeal in order to obtain a judgment against Lumbermens which, of course, would not bind Dutcher, and thus seek to enlarge the coverage. The statement of the minority (Appendix A, page 31, n. 7) to the effect that the limits of the policy are not increased by the inclusion of more than one insured is no answer to the possible enlargement because a state court may find Dutcher liable to the plaintiffs in the pending tort actions and, since Lumbermens does not deny that Dutcher is entitled to coverage, and never has taken such position, it would be required to pay judgments against him up to the policy limits. In appropriate proceedings, the state Court might decide that Cionci was not using the automobile in accordance with the permission granted him by Dutcher. Therefore, no inclusion of more than one insured would exist under state law. At the same time the federal court judgment would bind Lumbermens, if the minority opinion prevailed, and Provident has a judgment of $50,000 against Cionci's estate under an arrangement entered into for settlement in that amount by the administrator of the penniless Cionci estate.

In considering the foregoing it must be remembered that Dutcher may be liable to the plaintiffs in tort without any showing that Cionci was his agent, that he had control of Cionci or that Cionci was driving within the scope of the permission granted. It is possible that Dutcher might be held liable on the ground that he should not have entrusted the vehicle to Cionci or to Lynch; it might be shown that he bailed a defective vehicle. Therefore, a finding of liability would not be inconsistent with a finding that no coverage existed for Cionci.

In the light of the foregoing, what justification has the minority for saying that the federal court could do complete justice in the absence of Dutcher? It is readily seen that Dutcher and the Lumbermens have been placed in ambiguous positions. There is no adversity between these parties and such can only exist if the minority opinion were the law.

If Dutcher is held liable to the plaintiffs in the tort actions in the state Court, and the minority is correct in stating that the policy limits are fixed; and if its construction of the phrase in the policy which states "inclusion herein of more than one insured shall not operate to increase the limits of the company's liability" is sound, Dutcher will be forced to share the fund, which he has produced by purchasing the policy, with a person who violated the limitations placed on his use of the vehicle. His unfortunate predicament will result from a judgment in an action to which he was not a party and, obviously, not represented by counsel. Such result cannot be said to be in accord with any reasonable concept of justice.

III. The minority view would substantially protract this litigation and lead to multiplicity of suits in the future.

In the view of the minority, indispensability depends, inter alia, upon practical considerations. After speaking of complete justice to all concerned, the minority gets to the point of recognizing that there is a real possibility that Dutcher may be injured by conflicting claims to protection under the policy (Appendix A, page 31). Certainly this will be the situation if judgments in excess of $50,000 are obtained by the other plaintiffs. One is a death case and the other a serious bodily injury claim. As was stated in the Supplemental Brief filed on behalf of Lumbermens in the

Court of Appeals (page 2), the judgment agreed to between Provident and Cionci's estate constitutes one-half of the total coverage. The minority, with no knowledge of the worth of the open cases, proposes to guess as to whether or not the total of all judgments will exceed the policy, saying there will be no conflict if the judgments do not exceed the coverage, and, then, saying that perhaps they might exceed the coverage, envisions litigation involving the Cionci estate, Dutcher and Lumbermens to determine Dutcher's "claim to superiority over Cionci's estate to indemnity from the fund created by the policy" (Appendix A, page 31). It is said that Dutcher can then litigate the question whether Cionci was driving with his (Dutcher's) permission at the time of the accident. In other words, relitigate the very question which the minority says was settled between the Cionci estate and Lumbermens in the court below. Under the policy there is no "superior right" to coverage. A person is an insured or he is not an insured. If Dutcher wins the coverage action against the Cionci estate in the state court, then the very situation which lower courts were directed to avoid in *Maryland Casualty Company v. Pacific Coal and Oil Co., et al.,* 312 U. S. 270, 274, 61 Supreme Ct. Rep. 510 (1941) will exist. This case was cited in both briefs filed on behalf of the Lumbermens in the Court of Appeals. The opinion states the rule that a federal court should not entertain a case where its decree cannot bind a party who is free to go into a state court where he may obtain a judgment directly opposite to that obtained in the federal Court. The *Maryland Casualty Company* case, supra, follows the reasoning of *Aetna Life Ins. Co. v. Haworth,* 300 U. S. 227, 241 (1937) which is referred to by the majority opinion (Appendix A, page 27, n. 16). Neither case is discussed in the minority opinion.

It is clear that the minority is seeking to tailor an opinion to this particular case. The grounds are that its view will

insure complete justice to all parties and that the view is supported by practical considerations.

With due regard for the philosophy of the author, it is respectfully submitted that the minority view would not only fail to achieve those ends but would create unlimited confusion. Hundreds of declaratory judgment actions are brought in federal courts every year. If they can be decided without a party who can later litigate the same factual question in a state court, it is not difficult to foresee the confusion that will be created. But the evils will not be limited to confusion. Delay, also, will be one of the major consequences. If the suggestion of the minority is followed, the prevailing party will be required to mark time until the other tribunal involved has entered a final judgment. That is what is proposed in the instant case. And who shall determine the ultimate end if a federal court and a state court reach diametrically opposite conclusions.

The only answer is rule by law and not by a philosophical approach designed to achieve a result in a particular case.

IV. Authorities cited in minority opinion.

The federal district court cases cited in the minority opinion (Appendix A, page 31, n. 6) have been reviewed and none of them is pertinent to the issues in the instant case. They involve coverage problems which could be solved without reference to the rights of persons not joined. None of the cases indicates that rights of persons not joined were of paramount importance as are the rights of Dutcher in the instant case.

The statement, repeated in various parts of the minority opinion, that Lumbermens will not be subject to double liability, would seem to be inaccurate, as hereinbefore discussed, and no authority is cited for that conclusion by the minority.

It is suggested that analogizing Dutcher and the Cionci estate to joint tortfeasors (Appendix A, pages 32 and 33) is not justified. There is nothing in the record to suggest joint tortfeasorship and the conclusion drawn from the comparison has no validity. The relationship is that of indemnitor and indemnitee as stated by the minority (Appendix A, pages 31-32, n. 8). Therefore, the case cited by the minority, *Lawlor v. National Screen Service Corp.*, 349 U. S. 322, 330 (1955) has no bearing and is no authority for whatever proposition it is supposed to support.

It is said in the minority opinion (Appendix A, page 29) that from the earliest times courts have been guided in determining indispensability by practical considerations. Reference is made to *Shaughnessy v. Pedreiro*, 349 U. S. 48, 54 (1955), wherein a suit against a subordinate official, without joinder of the superior, was sustained. However, in *Johnson v. Kirkland*, 290 F. 2d 440 (1961), cert. denied 368 U. S. 889, it was held that the failure to join the superior was fatal. The cure was not to distort the concept of indispensable party but to place the matter before Congress which passed the Act of October 5, 1962, Pub. L. 87-748, sec. 2, 76 Stat. 744, 28 U. S. C. sec. 1391 (e). As judicial legislation was not the answer to the problem dealt with there, so judicial legislation is not indicated in the instant case. Since no act of Congress can create a right to decide cases in the absence of an indispensable party the solution is for parties to bring actions in a jurisdiction where *all* persons with an interest, such as Dutcher in this case, may be bound by the judgment entered.

CONCLUSION.

While the minority opinion speaks of finality of the decree, justice to all parties and practical considerations, it is found upon examination of the opinion that it does not envision formality, except in a most restricted sense; that justice to all parties is not achieved, not even to plaintiffs, and that protracted litigation is inevitable if the minority's views are followed.

Respectfully submitted,

NORMAN PAUL HARVEY,
Attorney for Respondent.